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# DISSENTING SHAREHOLDERS' STATUTORY RIGHT TO FAIR CASH VALUE: *Armstrong v. Marathon Oil Co.*

by

MICHAEL G. SCHINNER<sup>a</sup>

## INTRODUCTION

On October 30, 1981, investors around the country witnessed the opening salvo to what would become "the largest action for relief to dissenting shareholders in the judicial history of Ohio."<sup>1</sup> On that date, Mobil Corporation (Mobil) announced its offer to purchase up to forty million outstanding common shares of stock in the Marathon Oil Company (Marathon) for \$85 per share in cash.<sup>2</sup> The offer was contingent upon, among other things, the tendering by shareholders of at least thirty million shares and the non-withdrawal of these tendered shares before the expiration of the offer.<sup>3</sup> Mobil's acquisition of thirty million shares would guarantee it ownership of approximately 51% of the outstanding shares, while its acquisition of forty million would guarantee it ownership of approximately 68% of the outstanding shares.<sup>4</sup> If successful, the tender offer would enable Mobil to elect a majority of the directors.<sup>5</sup>

Immediately following Mobil's offer, Marathon's Board of Directors called an emergency meeting.<sup>6</sup> At the meeting, the Board determined that the offer was grossly

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<sup>1</sup> *Price v. Marathon Oil Co.*, No. 43273, slip op. at 1 (C.P. Ohio Dec. 27, 1983). This case is one of many trial level cases that were consolidated into the principal case, *Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 513 N.E.2d 776 (1987). *Price*, however, is the only trial level case that explains in detail the events that precipitated the filing of the *Armstrong* class action suit.

<sup>2</sup> *Price*, No. 43273, slip op. at 1.

<sup>3</sup> *Mobil Corp. v. Marathon Oil Co.*, No. C-2-81-1402, slip op. at 8 (S.D. Ohio Dec. 7, 1981) (1981 W.L. 1713).  
<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 9. Under section 1701.55(C) of the Ohio Revised Code, any shareholder following the statutorily prescribed procedures may require the use of cumulative voting in the election of directors. OHIO REV. CODE ANN. § 1701.55(C) (Anderson 1985 & Supp. 1987). Cumulative voting enables a shareholder to cumulate the voting power he possesses and "give one candidate as many votes as is equaled by the number of directors to be elected multiplied by the number of his votes, or to distribute his votes on the same principle among two or more candidates, as he sees fit . . . . The purpose of cumulative voting is not to take away from the majority the right to control, but rather to give to the minority some representation on the board of directors, and, incidentally, a voice in the affairs of the corporation." 12 OHIO JUR. 3d, *Business Relationships* § 585 (1979). Still the minority will be unable to elect a majority of the board of directors if the majority shareholders cumulate their strength. *Id.* Thus, if Mobil were to acquire 51% or 68% of Marathon's outstanding shares, its controlling interest would enable it to control the Board of Directors.

<sup>6</sup> *Armstrong*, 32 Ohio St. 3d at 398, 513 N.E.2d at 779.

inadequate and not in the best interest of Marathon or its shareholders.<sup>7</sup> Accordingly, the Board authorized Marathon's officers to consider various ways to repel Mobil's takeover attempt, including: (1) Sending letters to Marathon shareholders urging them not to tender their shares to Mobil; (2) filing an action seeking to enjoin the Mobil takeover; (3) initiating efforts to secure a "white knight;"<sup>8</sup> and (4) arranging for a complete or partial liquidation of Marathon.<sup>9</sup>

Marathon's officers opted for the second and third alternatives. On November 1, 1981, Marathon filed an action in the United States District Court for the Sixth Circuit, alleging that the Mobil offer violated various federal antitrust regulations and seeking to enjoin the planned takeover by Mobil.<sup>10</sup> The district court granted Marathon's motion for preliminary injunctive relief,<sup>11</sup> and on two separate occasions the United States Court of Appeals for the Sixth Circuit upheld the ruling.<sup>12</sup>

The preliminary injunction gave Marathon time to find a white knight. On November 19, 1981, a merger agreement between Marathon and U.S. Steel was announced.<sup>13</sup> Under the terms of the merger proposal, U.S. Steel would extend, until December 4, 1981, a tender offer for 51% of Marathon's outstanding stock on a pro rata basis at a price of \$125 per share.<sup>14</sup> After the December 4th deadline, the remaining shareholders would receive a \$100 face value twelve-year bond, paying a guaranteed 12.5% interest, for each share of stock.<sup>15</sup>

<sup>7</sup> *Id.* at 398-99, 513 N.E.2d at 779. Early in 1981, the management of Marathon recognized that its company might be a "takeover" target because Marathon stock was selling on the New York Stock Exchange at a price significantly lower than what the management estimated the per share value of the company's stock to be. The estimated per share figures were the result of two studies, one internal and one external, which reported a per-share value not lower than \$188 and as high as \$323. *Id.* at 398, 513 N.E.2d at 778-79.

<sup>8</sup> One court has defined "white knight" as:

[A] word of art used to describe potential merger partners with whom a target company negotiates toward the realization of a merger on terms which the target company management finds acceptable; essentially the "white knight" is a merger partner who is willing to negotiate the terms of the anticipated merger . . . [I]n other words the white knight pursues ownership by means of a "sweetheart deal" with the incumbent management, while a raider deals directly with the shareholders.

*American Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 732 & n. 19 (E.D. Va. 1980).

<sup>9</sup> *Armstrong*, 32 Ohio St. 3d at 399, 513 N.E.2d at 779.

<sup>10</sup> *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 317 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *reaff'd*, 669 F.2d 384 (6th Cir.), *cert. denied*, 455 U.S. 982 (1982). Plaintiff Marathon brought the action under section 16 of the Clayton Act, 15 U.S.C. § 26, seeking to enjoin defendant Mobil from acquiring its company. *Marathon*, 530 F. Supp. at 317. Marathon asserted that a merger of the two companies would violate section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that lessen competition or tend to create monopolies. *Id.*

<sup>11</sup> *Id.* at 326. The court based its decision on evidence that Mobil's takeover would give that company the largest or second largest share of the gasoline market in each of six states: Illinois, Indiana, Michigan, Ohio, Tennessee, and Wisconsin. *Id.* at 323.

<sup>12</sup> Under the same case name, *Marathon Oil Co. v. Mobil Corp.*, the Sixth Circuit first upheld the injunction on December 23, 1981. *Marathon*, 669 F.2d 378 (6th Cir. 1981) *cert. denied*, 455 U.S. 982 (1982). Two weeks later, on January 4, 1982, the Sixth Circuit again upheld the ruling. *Marathon*, 669 F.2d 384 (6th Cir. 1982).

<sup>13</sup> *Armstrong*, 32 Ohio St. 3d at 399, 513 N.E.2d at 779.

<sup>14</sup> *Id.* at 399, 400, 513 N.E.2d at 779-80.

<sup>15</sup> *Id.* Actually the follow-up merger was to be with a subsidiary of U.S. Steel, called U.S.S. Corporation.

By December 4, 1981, approximately 91.4% of Marathon shares had been tendered to U.S. Steel.<sup>16</sup> Accepting the tender of these shares on a pro-rated basis, U.S. Steel purchased 51% of Marathon stock on January 7, 1982.<sup>17</sup> Subsequently, at a special shareholders meeting held on March 11, 1982, shareholders owning more than two-thirds of all Marathon shares, including the 51% now owned by U.S. Steel, approved the merger.<sup>18</sup>

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*Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 367 (6th Cir. 1981).

The agreement had two significant conditions. First, it gave U.S. Steel an "irrevocable option to purchase ten million authorized but unissued shares of Marathon common stock for \$90 per share." *Mobil*, 669 F.2d at 367. "These shares equalled approximately 17% of Marathon's outstanding shares." *Id.* Second, in the event U.S. Steel's offer did not succeed and a third party gained control of Marathon, the agreement gave U.S. Steel an option to purchase a 48% interest in the Yates Field for \$2.8 billion. Yates Field was one of Marathon's largest assets--its "crown jewel." *Id.*

Mobil challenged these conditions in federal court, alleging that they served as a "lock-up" arrangement to defeat competitive offers, thereby constituting a manipulative practice in connection with a tender offer in violation of section 14(e) of the Williams Act, 15 U.S.C. § 78n(e). *Id.* at 368.

On November 24, 1981, the United States District Court for the Southern District of Ohio granted in part Mobil's motion for a temporary restraining order, prohibiting Marathon and U.S. Steel from taking any action in connection with the tender offer of the Yates Field option. *Id.* at 368-69. Mobil thereafter announced a new bid, offering to purchase at least 30 million common shares of Marathon stock at \$126 per share in cash. *Id.* at 369. The offer, however, was conditioned on findings by the federal appellate court that the U.S. Steel stock option and the Yates Field option were invalid. *Id.*

On December 7, 1981, shortly after Mobil's amended offer, the district court denied a preliminary injunction. *Id.* The United States Court of Appeals for the Sixth Circuit reversed, holding that the two options constituted "manipulative" practices in connection with the tender offer. *Id.* The court of appeals defined "manipulation" as "an affecting of the market for, or price of, securities by artificial means, i.e., means unrelated to the natural forces of supply and demand." *Id.* at 369, 374 (emphasis in original). Even though the terms of the option agreements were fully disclosed, the court found that the options circumvented the natural forces of market demand and thus constituted manipulative conduct in violation of section 14(e) of the Williams Act. *Id.* at 376.

In fashioning appropriate equitable relief, the district court, on remand, extended the date by which shareholders could withdraw their acceptance of the U.S. Steel offer until January 6, 1982. *Armstrong*, 32 Ohio St. 3d at 399-400, 513 N.E.2d at 780. The court, however, did not change the December 4, 1981, proration date; that is, the date by which Marathon shareholders had to tender their shares to U.S. Steel. *Id.*

The *Mobil* decision was the subject of much judicial criticism; indeed, its holding was specifically rejected by a number of federal courts. See, e.g., *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983) (considering disclosure requirements of Rule 14e-2, court stated purpose of Williams Act was to ensure that shareholders need not respond to tender offer without adequate information; Act requires disclosure of "material objective matters"), *cert. denied*, 465 U.S. 1052 (1984); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 760 (2d Cir.) (holding that no section 14(e) manipulation could exist absent evidence of misrepresentation or nondisclosure), *cert. denied*, 464 U.S. 1018 (1983); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 288 n. 10 (4th Cir. 1983) (sole purpose of section 14(e) is to afford adequate disclosure to shareholders of target corporation); *Martin Marietta Corp. v. Bendix Corp.*, 549 F. Supp. 623, 630 (D. Md. 1982) (concluding that action under section 14(e) requires demonstration that some deception has occurred); see also, *Panther v. Marshall Field & Co.*, 646 F.2d 271, 283 (7th Cir.) (section 14(e) designed to provide shareholders considering tender offer with adequate information), *cert. denied*, 454 U.S. 1092 (1981); *Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir.) (sole purpose of section 14(e) is protection of investors confronted with tender offer; accordingly, one element of section 14(e) cause of action is proof there was misrepresentation upon which shareholders of target company relied), *cert. denied*, 449 U.S. 951 (1980).

<sup>16</sup> *Armstrong*, 32 Ohio St. 3d at 399, 513 N.E.2d at 779. "By way of contrast, approximately 47% of Marathon shares had been tendered to Mobil in response to its tender offer of \$85 per share." *Id.*

<sup>17</sup> *Id.* at 400, 513 N.E.2d at 780.

Thereafter, Frances A. Armstrong, an owner of two hundred shares of Marathon stock, joined with other dissenting shareholders and commenced an action in the Hancock County Common Pleas Court. These shareholders sought a determination and award of the "fair cash value" of their stock pursuant to section 1701.85 of the Ohio Revised Code.<sup>19</sup> At the ensuing trial, the dissenting shareholders presented evidence that the value of Marathon stock on March 10, 1982 was between \$163 and \$235.<sup>20</sup> One expert testified that the value was \$200 a share, plus or minus fifteen percent, and another expert testified that the value was approximately \$197 a share.<sup>21</sup> Marathon, on the other hand, introduced expert testimony that, absent the effect of the pending merger, the per-share value of Marathon stock on March 10, 1982, would be as low as \$47.43.<sup>22</sup> The trial court found the per-share value of Marathon stock to be \$78 per share.<sup>23</sup>

Both parties subsequently appealed from the judgment with respect to the trial court's method of valuating the Marathon stock. The Court of Appeals of Hancock County Ohio reversed the lower court's decision.<sup>24</sup> On appeal to the Ohio Supreme Court, held: "affirmed in part, reversed in part and cause remanded."<sup>25</sup> Where facts presented to the trial court evidence a reasonably active market for the particular corporate stock in question, the fair cash value is properly measured as the stock market price of the shares as of the day prior to that on which the shareholders vote on the corporate transaction.<sup>26</sup> This valuation would exclude any appreciation or de-

<sup>19</sup> *Id.* (citing Ohio Rev. Code Ann. § 1701.85(C) (Anderson 1985 & Supp. 1987)).

<sup>20</sup> *Price v. Marathon Oil Co.*, No. 5-84-4-5-84-9, slipop. at 6-7 (Ct. App. Ohio Jan. 14, 1986) (1986 W.L. 808). Section 1701.85(C) dictates that fair cash value is to be determined the day prior to the shareholders' vote on the merger in question. Ohio Rev. Code Ann. § 1701.85(C) (Anderson 1985 & Supp. 1987).

<sup>21</sup> *Price*, at 6-7.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 32.

<sup>25</sup> *Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 422, 513 N.E.2d 776, 798 (1987). The supreme court agreed with the appellate court's ruling that the trial court had erred in its fair cash value determination. The court, however, disagreed with the appellate court's analysis. Therefore, the court took the opportunity to resolve the lower court's incorrect and inconsistent interpretations of section 1701.85(C) of the Ohio Revised Code, the statute providing for the payment of fair cash value to dissenting shareholders. Accordingly, the court reversed the matter and remanded it to the trial court. *Id.* at 411-13, 513 N.E.2d at 789-91.

The court addressed several other issues, including: (1) The eligibility of certain Marathon shareholders to participate in the proceeding based upon whether they had complied with the notice requirement contained within section 1701.85(A) of the Ohio Revised Code; (2) whether the court of appeals erred by holding that the trial court had abused its discretion in denying motions for a continuance of the scheduled trial on the merits to permit a group of dissenting shareholders to engage in pretrial discovery upon the issue of fair cash value; (3) whether the Ohio Constitution guarantees the right to a jury trial in a valuation proceeding brought pursuant to section 1701.85; (4) whether a joinder of other causes of action is permitted under a proceeding brought pursuant to section 1701.85; and (5) whether the trial court improperly determined the rate of prejudgment interest. *Id.* at 398, 513 N.E.2d at 778. These issues, and the court's concomitant analyses, however, are beyond the scope of this Article.

<sup>26</sup> *Id.* at 397, syl. paras. 2, 3, 513 N.E.2d at 776, syl. paras. 2, 3.

*Note:* The syllabus of an opinion of the Ohio Supreme Court states the controlling points of law. See Rule 1(B) of the Ohio Supreme Court Rules for the Reporting of Opinions. Because the opinion merely attempts to cite to the syllabus wherever possible. 4

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## DISSENTING SHAREHOLDER'S RIGHTS

preciation resulting from the proposal submitted to the shareholders.<sup>27</sup>

## HISTORICAL BACKGROUND

*Common Law Treatment of Minority Shareholders*

Under the early common law, unanimous shareholder consent was a prerequisite to carry out fundamental corporate transactions such as a merger or consolidation of the corporation or a sale of all or substantially all of its assets.<sup>28</sup> As commerce exploded in the latter part of the nineteenth century, the common law requirement of unanimity proved to be a formidable barrier in the development of corporate America.<sup>29</sup> Accordingly, to forestall minority shareholders from exercising what could be called a "tyrannical" hold upon the corporation, legislatures responded by enacting statutes that permitted the making of fundamental corporate changes by a majority vote of the shareholders.<sup>30</sup> This, however, opened the door to victimization of the minority shareholder.<sup>31</sup>

*Appraisal Rights of Dissenting Shareholders*

To resolve this dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares from the corporation were widely adopted.<sup>32</sup> These

<sup>27</sup> *Armstrong*, 32 Ohio St 3d, at 397, syl. para. 3, 513 N.E.2d at 776, syl. para. 3.

<sup>28</sup> *Id.* at 402-03, 513 N.E.2d 781-82; see also, 12B W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.1, at 342 (1984); Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 HARV. L. REV. 233, 236-37 (1931); Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L.Q. 420, 420-22 (1930); Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624, 624-28 (1981); Note, *The Right of Shareholders Dissenting from Corporate Combinations to Demand Cash Payment for Their Shares*, 72 HARV. L. REV. 1132, 1143 (1959); Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453, 1453-54 (1966) [hereinafter *Valuation of Dissenters' Shares*]; Note, *The Appraisal Remedy in Illinois Under The 1983 Business Corporation Act: Some Suggestions for Improvement*, 19 J. MARSHALL L. REV. 229, 229-30, (1985); Note, *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal*, 74 MICH. L. REV. 1023, 1026-28 (1976) [hereinafter *A Reconsideration*]; Note, *Corporation Law--Dissenting Stockholder's Right of Appraisal--Determination of Value*, 28 N.Y.U. L. REV. 1021, 1021-22 (1953); Note, *The Dissenting Shareholder's Appraisal Remedy*, 30 OKLA. L. REV. 629, 629-30 (1977) [hereinafter *The Dissenting Shareholder's*]; Note, *Corporations--Corporate Combination--De Facto Merger and Stockholder Appraisal Rights*, 14 SW. L.J. 276, 277-78 (1960); Note, *Corporations--Stockholders' Appraisal Rights--Dissenting Stockholders of Purchasing Corporation Protected by Ohio Statute*, 35 U. CIN. L. REV. 704, 704 (1966); Note, *Corporate Law--Chipping Away at the Delaware Block: A Critique of the Delaware Block Approach to the Valuation of Dissenters' Shares in Appraisal Proceedings*, 8 W. NEW ENG. L. REV. 191, 193-99 (1986) [hereinafter *Corporate Law--Chipping Away*].

<sup>29</sup> See *supra* note 28 for articles discussing the development of shareholder consent requirements necessary to effect fundamental corporate change.

<sup>30</sup> Annotation, *Valuation of Stock of Dissenting Stockholders in Case of Consolidation or Merger of Corporation, Sale of its Assets, or the Like*, 48 A.L.R.3d 430, § 2[a] (1973). Today, all states have some statute providing that unanimity is no longer a requirement for shareholders to approve fundamental corporate changes such as mergers or a sale of assets. See Note, *The Dissenting Shareholder's*, *supra* note 28, at 630.

<sup>31</sup> See W. FLETCHER, *supra* note 28, at 343 § n.1.

<sup>32</sup> *Id.* Today, all fifty states and the District of Columbia provide appraisal rights to dissenting shareholders.

appraisal rights served to strike a balance between the interest of the majority in effecting corporate change and the interest of the minority in not being forced to hold stock in a corporation radically different from the one in which they invested.<sup>33</sup> The statutes which prescribe these appraisal proceedings are typically simple and straight forward. Many statutes provide for a mandatory appointment of appraisers to determine the value of the dissenters' shares.<sup>34</sup> Of those statutes, most permit the courts to review the report of the appraisers.<sup>35</sup> Should a court find the figures to be arrived at arbitrarily or based upon unreasonable evidence, the court may establish its own valuation.<sup>36</sup> Still other statutes provide that the trial court has discretion in the appointment of appraisers but must, after hearing all the evidence, make its own determination of the value of the dissenting shareholders' stock.<sup>37</sup> Finally, in one state, it is the jury who determines the value of a dissenters' shares.<sup>38</sup>

While the proceedings to determine the value of the dissenters' stock are laid out in technical detail, the statutes scarcely ever define the actual valuation methodology to be used.<sup>39</sup> The statutes may be divided into two classes for purposes of comparative analysis. According to Professor Lattin, "[t]he first type, and most numerous, prescribes an appraisal and payment of the 'value,' the 'fair value' or the 'fair cash value.' The second type calls for an appraisal and payment of the 'market value' or the 'full market value.'"<sup>40</sup> Regarding the second type, the legislatures undoubtedly intended to have the shares appraised on a market basis if such a market existed.<sup>41</sup> As suggested in *In Re Capital Stock of Morris Canal & Banking Co.*, what is meant by "market value" is "the market value of the stock as shown by other sales of such stock made between willing sellers and willing buyers."<sup>42</sup> Stock actively traded on one of the exchanges would seem to satisfy this definition of "market value."<sup>43</sup>

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See Note, *Corporate Law--Chipping Away*, *supra* note 28, at 198-99 & nn. 32-33.

<sup>33</sup> See *supra* note 28 for articles discussing the purpose of the appraisal remedy. Appraisal rights have been criticized on several grounds. Corporations that must buy back shares from dissenting shareholders may find that they no longer have a cash supply sufficient to complete the acquisition. Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 234 (1962). If the purchase price that the corporation must pay is substantial, the owners of a small percentage of the stock could make the transaction impracticable and would, therefore, possess bargaining power disproportionate to the number of shares they own. *Id.*

<sup>34</sup> See W. FLETCHER, *supra* note 28, at § 5906.8, at 375.

<sup>35</sup> *Id.* at § 5906.8, at 376. For the most part, however, the courts will generally leave the appraisers' report undisturbed. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 375.

<sup>38</sup> *Id.* (citing GA. CODE ANN. § 22-1202(g)(1)).

<sup>39</sup> See Lattin, *supra* note 28, at 244.

<sup>40</sup> *Id.* at 258.

<sup>41</sup> *Id.* at 258-59.

<sup>42</sup> *Id.* at 259 (quoting *In re Capital Stock of Morris Canal & Banking Co.*, 104 N.J.L. 526, 528, 141 A. 784, 785 (1928)).

<sup>43</sup> Indeed, a number of statutes define "market value" as referring to the stock market value when the stock is traded upon national securities exchanges, or, more specifically, traded upon the New York Stock Exchange. See, e.g., GA. CODE ANN. § 22-1201 (1987 Cum. Supp.) (specifying New York Stock Exchange as market value indicator for valuation purposes).

No similar criterion has emerged from the courts' attempts to define "value," "fair value," and "fair cash value." As one court has said: "[W]hether the statute calls for the payment of value, fair value, or fair cash value, makes little difference since the terms are considered synonymous . . . The real objective is to ascertain the actual worth of that which the dissenter loses."<sup>44</sup> Traditionally, courts and appraisers have limited their choice of valuation to one of three methods: Net asset value, net earnings value, and market value.<sup>45</sup> Over the past few decades, however, many courts have adopted an eclectic or compromise theory of appraisal, by which the value of the business depends to some extent on each of the three methods.<sup>46</sup> Under this "weighting method," the courts or the appraisers look to the facts of a particular case and assign each component a percentage in accordance with its relative importance.<sup>47</sup> This method is known as the "Delaware block approach"<sup>48</sup> and is based on the premise that no one factor is determinative of value and that each value should carry some, but not conclusive, weight.<sup>49</sup>

Courts have used the Delaware block approach "for roughly forty years" with no apparent justification.<sup>50</sup> In recent years, however, the Delaware block approach has come under judicial and scholarly criticism.<sup>51</sup> In February of 1983, the Delaware Supreme Court, in *Weinberger v. UOP, Inc.*, addressed the inadequacies of the appraisal remedy and restructured the valuation method.<sup>52</sup> The *Weinberger* holding significantly affected the rights of minority shareholders by prohibiting the use of the Delaware block method to the extent that it excluded other valuation techniques generally accepted by the financial community.<sup>53</sup> The *Weinberger* court described the Delaware block's formulaic approach to the valuation process as "clearly out-moded" and discordant with the purpose and intent of the statutory remedy available

<sup>44</sup> *Warren v. Baltimore Transit Co.*, 220 Md. 478, 482-83, 154 A.2d 796, 799 (1959) (footnote omitted).

<sup>45</sup> See Note, *Corporate Law--Chipping Away*, *supra* note 28, at 192.

<sup>46</sup> *Id.* (citing I J. BONRIGHT, VALUATION OF PROPERTY 223 (1937)).

<sup>47</sup> See Note, *The Appraisal Remedy in Corporate Freeze-Outs: Questions of Valuation and Exclusivity*, 38 Sw. L.J. 775, 779 (1984). For example, the percentage assigned to the market value of a corporation not listed on a stock exchange or infrequently traded would be relatively low. See *Sporborg v. City Specialty Stores, Inc.*, 35 Del. Ch. 560, 123 A.2d 121 (1956).

<sup>48</sup> See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 712 (Del. 1983). Although courts have used the "weighting method" for roughly forty years, the technique was not labeled as the "Delaware block" approach until the last decade. See Note, *Corporate Law--Chipping Away*, *supra* note 28, at 192-93 & n.10. Ironically, it was the United States District Court for the District of Hawaii, rather than a Delaware court, that first coined the term. *Id.* at n.10 (citing *Northern Acceptance Trust 1065 v. Amfac, Inc.*, 59 F.R.D. 116, 125 (D. Haw. 1973)). The term was slow to catch on, but after a decade and a half, the Hawaiian court's denomination has become well-accepted. *Id.* (citing to *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 931 (Del. 1983); *Piemonte v. New Boston Garden Corp.*, 377 Mass. 719, 724, 387 N.E.2d 1145, 1148 (1979); *Blasingame v. American Materials, Inc.*, 654 S.W.2d 659, 668 & n.1 (Tenn. 1983); W. FLETCHER, *supra* note 28, at § 5906.12; *Kanda & Levmore, The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. Rev. 429, 439 n.36 (1985)).

<sup>49</sup> See Krishna, *Determining the "Fair Value" of Corporate Shares*, 13 CAN. BUS. L.J. 132, 157 (1987).

<sup>50</sup> Note, *Corporate Law--Chipping Away*, *supra* note 28, at 193 (citing Schaefer, *The Fallacy of Weighting Asset Value and Earnings Value in the Appraisal of Corporate Stock*, 55 S. CAL. L. REV. 1031, 1032 (1982)).

<sup>51</sup> *Id.* (citing Schaefer, *supra* note 50, at 1033).

<sup>52</sup> 457 A.2d 701 (Del. 1983).

<sup>53</sup> *Id.* at 712-13.



to dissenting shareholders.<sup>54</sup>

Courts around the country have responded to *Weinberger* in different ways. Some courts have refused to modify their use of the Delaware block with the more liberal approach espoused by *Weinberger*.<sup>55</sup> Other courts have liberalized their appraisal standards by allowing the use of valuation methods other than the Delaware block approach.<sup>56</sup> To ascertain the stock's actual worth or its "intrinsic value," these courts have adopted analyses that permit them to consider a number of factors. These factors include: "Net asset value; going concern value; liquidation value; net equity value; earnings value of the stock or dividends prospects; the nature of the enterprise and its relative position within the particular industry; post-merger gains or synergistic gain; tax benefits to all concerned; and rescission and equitable concerns."<sup>57</sup> These approaches, however, can be expensive, unpredictable, and susceptible to subjective applications.<sup>58</sup> Thus, faced with competing considerations of cost, fairness, and efficiency, some legislatures, like that of Ohio, have gone the more economically feasible and administratively easier route. Specifically, they have adopted just one test: The willing seller, willing buyer (hypothetical market) test.<sup>59</sup> Although these statutes contain some flexibility in their application, where an actual market is deemed to be sufficiently active in its trading of the stock in question, then the actual market price is given a preferred status over other valuation data.<sup>60</sup>

### OHIO'S APPRAISAL STATUTE AND RELATED CASE LAW

Ohio's original statute authorizing appraisal rights to dissenting shareholders was section 8623-72 of the Ohio General Code.<sup>61</sup> That section provided that,

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<sup>54</sup> *Id.* Under title 8, section 262(h) of the Delaware Code, the Court of Chancery: shall appraise the shares, determining their *fair* value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with a fair rate of interest, if any, to be paid upon the amount determined to be the *fair* value. In determining such *fair* value, the Court shall take into account *all* relevant factors.

DEL. CODE ANN. tit. 8, § 262(h) (1983) (emphasis added).

<sup>55</sup> See, e.g., *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 940 (Del. 1985) ("Weinberger did not abolish the block formula, only its exclusivity as a tool of valuation"); *Leader v. Hycor, Inc.*, 395 Mass. 215, 224, 479 N.E.2d 173, 178 (1985) ("We do not agree that the 'Delaware block method' for valuing closely held stock . . . is outmoded" (footnote omitted)); *Blasingame v. American Materials, Inc.*, 654 S.W.2d 659, 668 & n.1 (Tenn. 1983) ("We do not find anything in *Weinberger* that causes us to alter the adoption of the weighted average method").

<sup>56</sup> See, e.g., *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 571, 483 N.Y.S.2d 667, 675, 473 N.E.2d 19, 27 (1984) (factors used in appraisal proceeding would include but would not be limited to net asset value, book value, earnings, market value, and investment value); *Dermody v. Sticco*, 191 N.J. Super. 192, 196, 465 A.2d 948, 950 (1983) (all relevant factors must be considered in arriving at fair value).

<sup>57</sup> *Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 404, 513 N.E.2d 776, 783-84 (1987).

<sup>58</sup> See *id.* at 408-10, 513 N.E.2d at 786-88.

<sup>59</sup> See, e.g., OHIO REV. CODE ANN. § 1701.85(C) (Anderson 1985 & Supp. 1987) (adopting the willing seller-willing buyer test).

<sup>60</sup> See *Vought v. Republic-Franklin Ins. Co.*, 117 Ohio App. 389, 391, 192 N.E.2d 332, 333 (1962).

<sup>61</sup> OHIO GEN. CODE ANN. § 8623-72 (Anderson 1988).

in the absence of contrary provisions in a corporation's articles of incorporation, dissenting shareholders were entitled to be paid the fair cash value of their shares as of the day before the vote authorizing the sale or merger of the corporation.<sup>62</sup> Nowhere in the statute, however, was the term "fair cash value" defined.

One of the earliest decisions in Ohio that attempted to give meaning to the term "fair cash value" was *Miller v. Canton Motor Coach, Inc.*<sup>63</sup> In *Miller*, Adam Miller brought an action against Canton Motor Coach, Inc., a corporation in which Miller owned stock.<sup>64</sup> After the company's directors had agreed upon a sale of all the company's assets, they called a meeting of the stockholders to obtain formal approval.<sup>65</sup> With the exception of Miller, all the company's stockholders voted to approve the sale.<sup>66</sup> Pursuant to the provisions of section 8623-72 of the Ohio General Code, Miller demanded the fair cash value for his stock in the amount of \$300 per share.<sup>67</sup> The company countered with an offer of \$40.91 per share, a figure much closer to the per share book value of \$43.00.<sup>68</sup> Two of the three court-appointed appraisers, after an apparently careful investigation and examination of the records of the company, fixed the value of Miller's stock at \$156 per share.<sup>69</sup> The third appraiser, filed a minority report in which he strongly disagreed with the conclusion of the majority as to the value of the stock.<sup>70</sup> Nonetheless, the court approved the majority report and rendered judgment for Miller in the amount of \$156 a share.<sup>71</sup>

On appeal from the trial court's decision, the Stark County Court of Appeals faced an important question: What factors were to be considered in arriving at a just figure for the payment to a dissenting shareholder?<sup>72</sup> With a paucity of Ohio case law to guide it, the court turned to the leading case on the question of determining a stock's fair cash value, *In Re Clark's Will*.<sup>73</sup> The New York Court of Appeals had indicated in *Clark's Will* that the factors to be considered in determining fair cash value would vary from case to case and that no rule could govern every case.<sup>74</sup>

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<sup>62</sup> *Id.* To qualify for the fair cash value of his shares, the dissenting shareholder had to make a written demand for the payment of such fair cash value, stating the number and kind of shares held, and the amount claimed as their fair value. OHIO REV. CODE ANN. § 8623-72 (Anderson 1938).

<sup>63</sup> 58 Ohio App. 94, 16 N.E.2d 486 (1937).

<sup>64</sup> *Id.* at 95, 16 N.E.2d at 487.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Section 8623-72 of the Ohio General Code charged the courts to appoint three appraisers to ascertain the fair cash value of a dissenters' share of stock. A reasonable determination of fair cash value by a majority of the appraisers would bind the court to that determination. OHIO REV. CODE ANN. § 8623-72 (Anderson 1938).

<sup>70</sup> *Miller*, 58 Ohio App. at 95, 16 N.E.2d at 487.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 96, 16 N.E.2d 488.

<sup>73</sup> *Id.* at 97-98, 16 N.E.2d at 488 (citing *In re Fulton*, 257 N.Y. 487, 178 N.E. 766 (1931)). [Note, The *Miller* court incorrectly cited to *In re Fulton*, rather than the proper case name *In re Clark's Will*].

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Applying these principles to the case at hand, the *Miller* court found that the appraisers had appropriately considered a number of relevant factors, including the company's income, its franchise value, its actual and potential earnings, and the net worth of its physical assets.<sup>75</sup> The court concluded that fair cash value is not simply the market price, rather fair cash value is measured by the corporation's *intrinsic* worth.<sup>76</sup>

The Ohio Supreme Court first defined "fair cash value" in *Roessler v. Security Savings & Loan Co.*, a case very similar to *Miller*.<sup>77</sup> The plaintiffs in *Roessler* were owners of a large number of shares of stock in the defendant corporation, Security Savings & Loan Company.<sup>78</sup> After a shareholder vote authorized a merger with another savings and loan company, the plaintiffs dissented in writing and demanded the fair cash value of their shares in the amount of \$160 per share.<sup>79</sup> The defendant countered with an offer of \$25 per share.<sup>80</sup> In a proceeding to determine the fair cash value of the plaintiffs' shares, the three court-appointed appraisers found the value of the dissenters' shares to be \$43.50 each.<sup>81</sup> The trial court confirmed this amount.<sup>82</sup> The court, however, had instructed the appraisers to use market value rather than intrinsic value in making their determination.<sup>83</sup>

The issue facing the Ohio Supreme Court was whether the trial court had committed prejudicial error in its instruction to the appraisers regarding the proper construction of fair cash value.<sup>84</sup> The court began its review by canvassing how other states had interpreted "fair cash value" and similar terms.<sup>85</sup> Based on its findings, the court concluded that, in a proceeding brought pursuant to section 8623-72 of the General Code, the term "fair cash value" meant intrinsic value.<sup>86</sup> As such, the instruction to the appraisers erroneously defined fair cash value as market value to

<sup>75</sup> *Miller*, 58 Ohio App. at 98-99, 16 N.E.2d at 488-89.

<sup>76</sup> *Id.* at 99, 16 N.E.2d at 489. *Accord* Wisman v. Cleveland Ry. Co., 25 Ohio Op. 281, 286 (C.P.) ("fair cash value of . . . stock . . . means what the stock is worth *intrinsically* and not necessarily its market price, and . . . there are many factors to be considered in arriving at such value"), *aff'd*, 39 Ohio L. Abs. 391, 52 N.E.2d 865 (Ct. App. 1943).

<sup>77</sup> *Roessler v. Security Sav. & Loan Co.*, 147 Ohio St. 480, 72 N.E.2d 259 (1947).

<sup>78</sup> *Id.* at 481, 72 N.E.2d at 259.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 481, 72 N.E.2d at 259-60.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 483, 72 N.E.2d at 260. The trial court instructed the appraisers using the following language:

The term "fair cash value" means a sum equal to the price which it is reasonably probable would have resulted from a sale of said shares for cash, after fair negotiations between a bona fide purchaser, able and willing to buy for cash, but under no compulsion to buy, and an owner willing to sell, but under no compulsion to sell, after fair and reasonable efforts to obtain the purchaser who would pay the highest price, excluding from said price, however, any appreciation or depreciation therein in consequence of the merger hereinbefore mentioned.

*Id.*

<sup>84</sup> *Id.* at 482, 72 N.E.2d at 260.

<sup>85</sup> *Id.*

the prejudice of the plaintiffs.<sup>87</sup> The court noted that in certain instances market value can be considered an element of intrinsic value, but it should not be the sole or basic test; there are numerous other factors a court or an appraiser should consider when determining fair cash value.<sup>88</sup> The court enumerated several of these factors, including: "the business of the defendant and its prospects of its business for the future; the nature of its property; its financial condition; the value of its assets; the amount and nature of its fixed and contingent liabilities; its earnings in the past and its prospects of earnings in the future; and the dividends paid by it in the past and its prospects for paying dividends in the future."<sup>89</sup> Other factors included the defendant's "management and reputation; the value of its good will; the market value of its shares; and its future prospects in a financial way."<sup>90</sup> In sum, *Roessler* held that in order to determine fair cash value a court must consider "every factor bearing on value."<sup>91</sup>

In response to *Roessler*, the Ohio General Assembly enacted section 1701.85(C) of the Ohio Revised Code on October 11, 1955.<sup>92</sup> Section 1701.85(C) defines the fair cash value of dissenting stock as that amount which a willing seller, under no compulsion to sell, would be willing to accept and a willing buyer, under no compulsion to purchase, would be willing to pay.<sup>93</sup> The statute fixes as the valuation-date the day prior to the shareholder vote approving a merger or sale of the corporation's assets.<sup>94</sup> To prevent creating a formula too rigid to take into consideration the exigencies of each individual case, the statute also provides that any appreciation or depreciation in the share's value resulting from the proposal acted upon at the shareholders meeting should be excluded.<sup>95</sup>

In *Vought v. Republic-Franklin Insurance Co.*, the Ohio Court of Appeals for Franklin County provided one of the first discussions of the meaning and application

<sup>87</sup> *Id.* at 480, syl. para. 2, 72 N.E.2d at 259, syl. para. 2.

<sup>88</sup> *Id.* at 482-83, 72 N.E.2d at 260.

<sup>89</sup> *Id.* at 483, 72 N.E.2d at 260-61.

<sup>90</sup> *Id.* at 483, 72 N.E.2d at 261.

<sup>91</sup> *Id.* at 483, 72 N.E.2d at 260.

<sup>92</sup> 1955 Ohio Laws 432, 485.

<sup>93</sup> OHIO REV. CODE ANN. § 1701.85(C) (Anderson 1985 & Supp. 1987). It was the Ohio State Bar Association Committee that recommended adding the willing buyer-willing seller language to section 1701.85(C). According to the Committee:

[Division (C)] contains a frequently used definition of "fair cash value." This definition is one that is found in a great mass of judicial decisions both in Ohio and elsewhere, in litigation involving the value of property, in appropriation suits, tax controversies, and other legal proceedings in which property must be valued. It is believed that this definition will give the Bar a clearer test than that of "intrinsic value" established by the Supreme Court in *Roessler v. Security Savings & Loan Co.*

*Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 406, 513 N.E.2d 776, 785 (1987) (quoting 28 Ohio B. 102 (1955)).

In addition to Ohio, a small but growing minority of states presently defines the value of a share by the willing buyer-willing seller test. *Id.* at 407 n.12, 513 N.E.2d 776, 785 n.12. "Obviously, market price of the stock is the focus of such valuation." *Id.*

<sup>94</sup> OHIO REV. CODE ANN. § 1701.85(C) (Anderson 1985 & Supp. 1987).

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See *id.*

of the statute's willing seller-willing buyer definition.<sup>96</sup> The plaintiffs in *Vought* dissented from a merger of the defendant Republic- Franklin Insurance Company.<sup>97</sup> Pursuant to the provisions found in section 1701.85 of the Ohio Revised Code, the plaintiffs brought an action seeking a determination of the fair cash value of their shares.<sup>98</sup> A majority of the three court-appointed appraisers set the per share value at \$3.28, a figure confirmed by the court.<sup>99</sup> The dissenting shareholders appealed, contending that section 1701.85(C) did not apply where there was "no willing buyer-willing seller transaction as of the day before the merger vote."<sup>100</sup> In such an instance, they argued, the standard of valuation should have been the "intrinsic value."<sup>101</sup>

The court disagreed with this argument. Stating that the adoption of section 1701.85, including its definition of fair cash value, was a legislative overruling of the holding of *Roessler*, the *Vought* court rejected the intrinsic value test.<sup>102</sup> Instead, the court adopted the standard of a hypothetical market of willing buyers and sellers as provided for in the statute.<sup>103</sup> Under such a standard, evidence could be introduced as to any factor that a reasonable person would take into consideration to ascertain value. According to the court, the legislature's objective in adopting the willing buyer-willing seller standard was to measure value by a hypothetical market rather than an actual one.<sup>104</sup> An actual market was simply *evidence* of market value.<sup>105</sup>

By way of dictum, however, the *Vought* court asserted that certain types of evidence--for example, the existence of an actual market in which active trading occurred--might be so persuasive as to invoke a legally preferred status over more speculative methods of valuation such as original cost and capitalization of earnings.<sup>106</sup> The court pointed out that this statement would probably be true in most cases involving the valuation of stock that was actively traded on the New York Stock Exchange.<sup>107</sup> However, since there was no active trading in this particular case, the *Vought* court's conclusion constituted mere dictum.<sup>108</sup>

The same court of appeals did face such a case, however, several years later in *Parten v. Pure Oil Co.*<sup>109</sup> The plaintiffs in *Parten*, after dissenting from a proposed

<sup>96</sup> 117 Ohio App. 389, 192 N.E.2d 332 (1962).

<sup>97</sup> *Id.* at 389, 192 N.E.2d at 333.

<sup>98</sup> *Id.* at 389-90, 192 N.E.2d at 333.

<sup>99</sup> *Id.* at 390, 192 N.E.2d 333.

140) *Id.*

101 *Id.*

<sup>102</sup> *Id.* at 391, 192 N.E.2d at 334.

<sup>103</sup> *Id.* at 390-91, 192 N.E.2d at 333-34.

<sup>104</sup> *Id.* at 390-91, 192 N.E.2d at 334.

<sup>105</sup> *Id.* at 390, 192 N.E.2d at 333.

<sup>106</sup> *Id.* at 391, 192 N.E.2d at 333.

107 *Id.*

<sup>108</sup> *Id.* at 390, 192 N.E.2d at 333.

merger by the defendant Pure Oil Company, brought an action pursuant to section 1701.85 of the Ohio Revised Code.<sup>110</sup> They sought a determination of the fair cash value of their shares, which they claimed to be worth \$75 each.<sup>111</sup> The court-appointed appraisers, however, valued the shareholders' stock at \$66 a share.<sup>112</sup> The appraisers based this determination on several factors, including data related to asset value and going concern value.<sup>113</sup> The trial court subsequently rendered a decision confirming the appraisers' evaluation.<sup>114</sup> On appeal, the Franklin County Court of Appeals adopted and applied the standard set forth in *Vought*.<sup>115</sup> To wit, the court held that where the price at which shares are traded in an active market can be ascertained, such actual market price would in fact be the willing seller - willing buyer amount dictated by the statute.<sup>116</sup> Notably, prior to the *Armstrong* decision, *Vought* and *Parten* constituted the only reported cases interpreting section 1701.85(C) of the Ohio Revised Code since the statute's enactment in 1955.

### ARMSTRONG V. MARATHON OIL CO.

The Ohio Supreme Court, in *Armstrong v. Marathon Oil Co.*, held that when a corporate stock is actively traded, the actual market price is that stock's fair cash value.<sup>117</sup> In doing so, the Ohio Supreme Court specifically adopted the dictum of *Vought* and the holding of *Parten*, and, thereby, implicitly rejected the *Roessler* holding and the intrinsic value method of valuation. The court pointed out several rationales that supported the analyses set forth in *Vought* and *Parten*. The court observed that since the turn of the century, the typical investor has shifted from businessmen who had an entrepreneurial concern with the profit possibilities and records of the company into which they put their money, to workers and professionals who are concerned with assured incomes and long-term appreciation.<sup>118</sup> These modern-day investors do not take an interest in or closely scrutinize corporate operations; they are investment-minded rather than enterprise-oriented.<sup>119</sup> In addi-

<sup>110</sup> *Id.* at 5.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 8.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Id.*

<sup>117</sup> 32 Ohio St. 3d 397, 397 syl. para. 2, 513 N.E.2d 776, 776 syl. para. 2 (1987).

<sup>118</sup> *Id.* at 408, 513 N.E.2d at 786-87 (citing J. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* 86 (1970)).

<sup>119</sup> *Id.* (citing J. Hurst, *supra* note 118, at 86). One commentator stated that:

[I]n substantially every case other than [those] related to control, the owner of shares of a company listed on a national securities exchange regards himself as an investor in those securities, rather than as a part of the corporate enterprise. The investor's objective is not to promote the income of the corporation but to enhance his distributive share, not to increase the corporate assets but to enhance the value of his securities. Since the measurement of these objectives is provided by the exchanges . . . dissent and appraisal no longer [should be] required.

*Id.* at 408, 513 N.E.2d at 787 (citing Note, *A Reconsideration*, *supra* note 28, at 1029).

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The last part of the quote, "dissent and appraisal no longer [should be] required," referred to a

tion, most investors possess little or no knowledge of the value of a corporation's assets, its going concern value, its future earnings value, or other factors often used to ascertain a stock's intrinsic value.<sup>120</sup> The court, therefore, considered it unreasonable to utilize valuation techniques based upon factors the investor himself rarely contemplates.<sup>121</sup>

The court also championed the use of the market price as the best gauge of fair cash value because of its accuracy and efficiency.<sup>122</sup> Citing a number of studies, the court indicated that the market price of a share usually fluctuates in random fashion within a range quite near the actual value of the stock.<sup>123</sup> Thus, since the market has already efficiently appraised the stock, and its appraisal is generally as accurate as that of any court-appointed team, the court asserted that the market price reflects that amount envisaged by the legislature when it adopted the willing seller-willing buyer standard as the measure of fair cash value.<sup>124</sup>

According to the Supreme Court, the court of appeals, by rejecting the actual market price as the fair cash value of a dissenter's share of stock and instead holding that the value per share should be determined by a hypothetical sale, was "simply incorrect."<sup>125</sup> Rather than constructing hypothetical sales, the supreme court suggested that courts focus first on the major exchanges and then on the smaller exchanges or over-the-counter sales to determine whether there was sufficient trading to establish a market price.<sup>126</sup> Where market activity was significant, the court concluded, the market price should be used as a benchmark.<sup>127</sup>

Clearly there was significant market activity in the case *sub judice*. The evidence adduced at the trial showed that from November 2, 1981, to March 10, 1982, more than thirty-five million shares of Marathon stock, representing about

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widespread movement during the decade between the early 1960s and the early 1970s, in which several states withdrew the right of a dissenting shareholder to demand that his stock be appraised and the corporation compelled to purchase his stock at its appraised value. See Note, *A Reconsideration*, *supra* note 28, at 1023-26. This scheme, which is still present in many states, was known as the "stock market exception," so-called because stockholders were forced either to accede to the corporate action with which they disagreed or to sell their shares on the market. *Id.* at 1024-26.

<sup>120</sup> *Armstrong*, 32 Ohio St. 3d at 408-09, 513 N.E.2d at 787.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 409-10, 513 N.E.2d at 788.

<sup>123</sup> *Id.* at 409, 513 N.E.2d at 787 (citing Ball & Brown, *An Empirical Evaluation of Accounting Income Numbers*, 6 J. ACC. RES. 159 (1968); Crouch, *A Nonlinear Test of the Random-Walk Hypothesis*, 60 AM. ECON. REV. 199 (1970); Fama & Blume, *Filter Rules and Stock Market Trading*, 39 J. BUS. 226 (1966); Fama, Fisher, Jensen & Roll, *The Adjustment of Stock Prices to New Information*, 10 INT'L ECON. REV. 1 (1969); Granger & Morgenstern, *Spectral Analysis of New York Stock Market Prices*, 16 KYKLOS 1 (1963), discussed in BAUMOL, *THE STOCK MARKET AND ECONOMIC EFFICIENCY* 40-41 (1965); Mandelker, *Risk and Return: The Case of Merging Firms*, 1 J. FINAN. ECON. 303 (1974); Scholes, *The Market for Securities: Substitution versus Price Pressure and the Effects of Information on Share Prices*, 45 J. BUS. 179 (1972)).

<sup>124</sup> *Armstrong*, 32 Ohio St. 3d at 409, 412, 513 N.E.2d at 787, 790.

<sup>125</sup> *Id.* at 411, 513 N.E.2d at 789.

<sup>126</sup> *Id.* at 412, 513 N.E.2d at 790.

<sup>127</sup> *Id.*

62% of the company's total shares outstanding, were traded on the New York Stock Exchange.<sup>128</sup> Ironically, however, the Ohio Supreme Court reversed and remanded the case because the trial court gave the market price controlling emphasis without considering whether the proposed merger had influenced the price of the stock.<sup>129</sup>

The trial court had found the fair cash value on January 6, 1982, to be \$78 a share.<sup>130</sup> That day, according to the lower court, was the last effective trading day before the merger took place.<sup>131</sup> The Ohio Supreme Court held that the trial court erred in two respects. First, the correct date for the valuation of the stock should have been March 10, 1982, and not January 6, 1982.<sup>132</sup> The statute mandates that fair cash value be determined as of the day prior to the shareholder vote on the merger in question.<sup>133</sup> Although the merger effectively took place on January 7, 1982, when U.S. Steel acquired a controlling interest in Marathon, the shareholders did not approve the merger until March 11, 1982.<sup>134</sup> Therefore, the court held, the valuation date should have been March 10, 1982, the day before the shareholders' vote as prescribed by the statute.<sup>135</sup>

According to the court, the trial court committed its second error by failing to take into consideration the impact of the U.S. Steel tender offer on the market price of Marathon's stock.<sup>136</sup> As the court pointed out, section 1701.85(C) states that when computing fair cash value, courts should exclude from that amount any appreciation or depreciation in market value resulting from the proposal submitted to the directors or the shareholders.<sup>137</sup> The trial court denied any appreciation in its fair cash price determination,<sup>138</sup> despite salient evidence that the bandied about merger discussions tremendously inflated the value of Marathon's stock.<sup>139</sup> Accordingly, the Ohio

<sup>128</sup> *Id.* at 410, 513 N.E.2d at 788-89. Marathon had 56,689,306 shares outstanding on March 10, 1982. *Id.*

<sup>129</sup> *Id.* at 413, 513 N.E.2d at 791.

<sup>130</sup> *Price v. Marathon Oil Co.*, No. 43273, slip op. at 61 (C.P. Ohio Dec. 27, 1983).

<sup>131</sup> *Id.*

<sup>132</sup> *Armstrong*, 32 Ohio St. 3d at 413, 513 N.E.2d at 791.

<sup>133</sup> OHIO REV. CODE ANN. § 1701.85(C) (Anderson 1985 & Supp. 1987).

<sup>134</sup> *Armstrong*, 32 Ohio St. 3d at 400, 513 N.E.2d at 780.

<sup>135</sup> *Id.* at 413, 513 N.E.2d at 791.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 413, 513 N.E.2d at 790. Appraisal statutes are intended to compensate the dissenter for his shares in the original corporation, before that corporation undergoes a fundamental change. *See supra* note 28 for articles discussing the purpose of the appraisal remedy. Accordingly, the Ohio statute provides that a dissenting shareholder is entitled to the value of his shares unaffected by any appreciation or depreciation that might be caused by the corporate action from which he dissented. OHIO REV. CODE ANN. § 1701.85(C) (Anderson 1985 & Supp. 1987). A dissenting shareholder, however, will never be able to sell his shares on the market at a price unaffected by the proposed change since market prices instantaneously adjust to new information. *See Note, A Reconsideration, supra* note 28, at 1052. Therefore, to prevent dissenting shareholders from receiving a windfall from appreciated stock or suffering unjustly from falling stock prices, the statute mandates that the court determine the point where the information concerning the impending action began to affect the market and adjust the price accordingly. OHIO REV. CODE ANN. § 1701.85(C) (Anderson 1985 & Supp. 1987).

<sup>138</sup> *Armstrong*, 32 Ohio St. 3d at 413, 513 N.E.2d at 791.

<sup>139</sup> *Price v. Marathon Oil Co.*, No. 43273, slip op. at 36-40 (C.P. Ohio Dec. 27, 1983). To illustrate, the following is a chronology of how Marathon's stock performed on the New York Stock Exchange during the various merger proposals.



Supreme Court reversed and remanded the case, holding that the trial court should have considered all evidence concerned with, or reasonably affecting, any apprecia-

On Friday, October 30, 1981, the last day of trading prior to the announcement of Mobil's offer, Marathon's stock was selling for \$67 1/2. *Id.* at 40. When the market opened that following Monday (November 2), Marathon's stock had escalated to a high of \$90 a share. *Id.* The price of the stock dropped dramatically over the next few weeks, however, as Marathon initiated an antitrust suit against Mobil with the outcome pending in the federal courts. *Id.* at 41.

From a low of \$77 a share on November 18, the stock jumped in just two days an incredible 30 points, to reach \$107 3/4, which, at that date, was an all-time high. *Id.* at 40, *Armstrong*, 32 Ohio St. 3d at 413, 513 N.E.2d at 790. The November 20th bonanza was precipitated by the announcement of U.S. Steel's two-tier offer to purchase a controlling interest of Marathon stock. *Price*, No. 43273 at 40. The price again slowly dropped, however, as Mobil filed suit against Marathon and U.S. Steel on December 13th alleging that U.S. Steel had engaged in manipulative practices in connection with its tender offer in violation of the Williams Act. *Id.* at 41. The price continued to sink until the United States Court of Appeals for the Sixth Circuit, on December 17th, ruled that U.S. Steel's tender offer violated the Williams Act and ordered the lock-out provision on the purchase of the Yates oilfield voided. *Id.* at 41-42.

On January 7, 1982, the day U.S. Steel purchased approximately 51% of Marathon stock, the market hovered around \$78 a share. *Id.* at Appendix O. When the shareholders finally approved of the merger on March 11, 1982, Marathon's stock was selling for \$76 a share. *Id.* at Appendix N.

Through a statistical technique known as regression analysis, one of Marathon's expert witnesses produced a chart that projected the price of Marathon Oil Company stock from October 30, 1981 (the date of Mobil's tender), through March 10, 1982 (the day before Marathon's shareholders voted to merge with U.S. Steel), had there been no Mobil or U.S. Steel tender offer. *Id.* at 39. Under this technique, not only was the hypothetical price of Marathon's stock calculated, but the prices of both integrated domestic oil companies and integrated international oil companies were traced as well. *Id.* By analyzing the performance of these comparable integrated oil companies during the same period (October 30 through March 10), Marathon's expert witness concluded that absent the Mobil and U.S. Steel tenders, the value of Marathon stock on March 10, 1982 would have dropped to \$49.72 a share, *a fortiori*, considering the oil industry's concurrent worldwide slump. *Id.* at 39-40 & Appendix I.

The chart below demonstrates the drop in the weekly Standard & Poor Index for several international oil companies, including: Exxon, Gulf Oil, Mobil, Royal Dutch Shell, Standard Oil of California, and Texaco, during the period paralleling the Marathon merger activities.

	1981			1982		
Week	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
1st	210	211	220	202	186	176
2nd	205	205	219	195	186	182
3rd	207	206	212	191	182	
4th	207	217	210	193	183	
5th	210					

*Id.* at Appendix J.

Marathon's expert witness also provided evidence which showed the weekly Standard & Poor Index for the domestic oil companies. These companies included: Atlantic-Richfield, Occidental Petroleum, Getty Oil, Phillips Petroleum, Shell Oil (U.S.), Standard Oil (Indiana), Standard Oil (Ohio), Sun Company, and Union Oil of California (Unocal Corp.).

	1981			1982		
Week	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
1st	331	354	347	312	283	236
2nd	314	339	357	291	272	237
3rd	323	325	345	290	265	
4th	327	343	339	289	259	
5th			338			

tion of the stock.<sup>140</sup>

## DISCUSSION

*Armstrong v. Marathon Oil Co.* represented the Ohio Supreme Court's first consideration of the meaning and application of the willing seller-willing buyer definition to the words "fair cash value."<sup>141</sup> Although there are some minor flaws in the court's analysis in *Armstrong*, the court advanced the clearest definition of "fair cash value" to date. Along the way, it cleared up many misconceptions regarding the willing seller-willing buyer (hypothetical market) theory.<sup>142</sup>

There is one noteworthy blemish in the court's analysis. The Ohio Supreme Court draws certain inferences from the statutory language of section 1701.85(C) while ignoring other equally plausible, yet contradictory inferences. Section 1701.85(C) defines fair cash value of a share as the amount that "a willing seller, under no compulsion to sell, would be willing to accept, and that a willing buyer, under no compulsion to purchase, would be willing to pay."<sup>143</sup> Although explicit resort to the actual price of the actively traded shares can be found in the dictum of *Vought* and the holdings of *Parten* and *Armstrong*, it is conspicuously absent from the statute.<sup>144</sup> Nowhere in the statute do the words "stock market price" appear. The Ohio General Assembly certainly could have said, "Judge, look to the stock market," but the legislature did not. This omission may merely reflect the legislature's intention that the statute apply to closely-held corporations whose

Lastly, Marathon's expert witness illustrated that the closing prices of these domestic oil companies, as traded on the New York Stock Exchange, dropped approximately 30% from November 30, 1981, to March 10, 1982.

Company	Closing Price 10-30-81	Closing Price 3-10-82	Change
Atlantic Richfield	48 1/8	35 5/8	-12 1/2
Cities Service	48 3/4	25	-23 3/4
Getty Oil	63 1/4	43 1/8	-20 1/8
Phillips Petroleum	41 1/4	27 1/2	-13 3/4
Shell (US)	43 3/4	29	-14 3/4
Standard Oil (Ind)	50 1/2	36 1/4	-14 1/4
Standard Oil (Ohio)	43 3/8	33 1/4	-10 1/8
Sun	39 1/4	30 3/4	-8 1/2
Union (Unocal Corp)	40 1/8	29 1/4	-10 7/8

*Id.* at Appendix L.

<sup>140</sup> *Armstrong*, 32 Ohio St. 3d at 413, 513 N.E.2d at 791.

<sup>141</sup> *Id.* at 406-07, 513 N.E.2d at 785.

<sup>142</sup> These misconceptions are evidenced by the fact that both the trial court and appellate court interpreted the willing seller-willing buyer standard differently; both, according to the Ohio Supreme Court, incorrectly. *Id.* at 411, 413, 513 N.E.2d at 789, 791.

<sup>143</sup> OHIO REV. CODE ANN. § 1701.85(C) (Anderson 1985 & Supp. 1987).

<sup>144</sup> See text and accompanying notes 106-37 *supra* for cases asserting that when an active market exists, the fair cash value of a share of stock is the actual market price.

shares are not traded on a stock exchange, as well as the large conglomerates like Marathon Oil. On the other hand, the statute's failure to mention the stock market price may indicate the legislature's wariness of the inherent imperfections of the stock exchanges as an indicator of value and its choice not to rely on them.

If the latter conjecture is true, the Ohio Supreme Court clearly ignored the legislature's concerns. Rather than creating a hypothetical market value as called for by the statute, the supreme court instead adopted the actual market price as the sole criterion of corporate stock value.<sup>145</sup> There are, however, compelling arguments regarding the accuracy of the stock market as an indicator of value that militate against its use. If the public stock market functioned as a perfect market, where all actors relied upon complete and accurate information, the courts would need to look only to the stock market price and the valuation of dissenter's shares would be greatly simplified. Unfortunately, a perfect market is only a theoretical ideal. In the real world the stock market is less than a perfect indicator of the value of a corporate concern.

There are several reasons why a corporations's intrinsic value and its market price may not, necessarily, be one and the same. First, investors frequently react to inaccurate stock information or are unable to interpret accurate information.<sup>146</sup> Second, because corporate information travels at different speeds, those investors who first receive the information are able to take advantage of the discrepancy between stock price and stock value. Theoretically, such a discrepancy should not exist. In reality, however, such a discrepancy will nearly always exist since market participants are seldom completely informed.<sup>147</sup> Third, when the transaction costs of buying and selling a particular stock exceed the difference between that stock's price and its value, many investors refrain from participating in the market.<sup>148</sup> Fourth, many external factors disturb the market's natural operation. For example, the prudent investor always takes into account the tax implications surrounding a purchase or sale of stock, even though the tax system bears no relation to that stock's underlying value.<sup>149</sup> Fifth, many individual investors rely on "tips" - which usually contain incomplete or inaccurate information - when deciding whether to invest in obscure corporations.<sup>150</sup> This, again, tends to distort stock market prices. Finally, relatively few investors, even among professionals, are able to fully grasp the myriad complexities inherent in the stock market.<sup>151</sup>

Recent stock market activity supports the proposition that market prices may, at times, vary from a stock's intrinsic value. Market prices often reflect "speculative

<sup>145</sup> *Armstrong*, 32 Ohio St. 3d at 397 syl. para. 2, 513 N.E.2d at 776 syl. para. 2.

<sup>146</sup> *See Note, A Reconsideration, supra* note 28, at 1038.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

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## DISSENTING SHAREHOLDER'S RIGHTS

optimism," an environment characterized by individuals who base their investment decisions upon irrational or visceral responses rather than upon logical considerations such as a company's assets or earnings strength.<sup>152</sup> For example, the prices of "growth stocks" frequently exceed the companies' earnings potential.<sup>153</sup> In contrast, investors tend to undervalue the less glamorous corporations despite the high earnings potential these companies possess.<sup>154</sup> Moreover, while stock market prices rise and fall quite rapidly in today's uncertain investment climate, it is doubtful that such extreme fluctuations coincide with changes in the intrinsic values of the shares.<sup>155</sup> Indeed, recent stock market prices indicate a somewhat inefficient market. For instance, while temperatures soared during the summer of 1985, stocks listed on the New York Stock Exchange traded at 30% below their underlying asset value.<sup>156</sup> Just two years later, experts attributed the fact that stock prices were way *overpriced* in relation to their underlying asset value as the primary cause of the October 19, 1987, stock market "crash."<sup>157</sup> Thus, a good case can be made that the Ohio General Assembly adopted the willing seller-willing buyer standard to act as a safeguard against the vagaries of an uncertain market. Specifically, it would prevent dissenting shareholders from receiving a windfall during an inflated market and suffering unjustly during a depressed market. If this is true, the Ohio Supreme Court, by adopting the actual market price as the measure of fair cash value, thwarted the legislature's intent.<sup>158</sup>

The legislature, however, failed to make its intention known. Therefore, if the Ohio Supreme Court made certain inferences as to the meaning of the willing seller-willing buyer standard, it was only because those inferences were necessary to arrive at a fair cash value determination. As provided in the statute, the willing seller-willing buyer standard is amorphous and prone to subjective, ad hoc interpretations by the lower courts. The willing seller-willing buyer standard, as enunciated by the *Armstrong* court, takes on a definitive shape: Whenever there is active trading of a particular stock in question, that stock's actual market price represents its fair cash value.<sup>159</sup> Adopting such a standard does no violence to the willing seller-willing buyer (hypothetical market) theory; under the right circumstances, the market price is the amount a willing seller would accept and a willing buyer would pay for a share

<sup>152</sup> *Id.* at 1038-39.

<sup>153</sup> *Id.* at 1039.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1039-40.

<sup>156</sup> See Note, *Corporate Law--Chipping Away*, *supra* note 28, at 216-17 (citing Kinsley, *You Won't Find an Efficient Market on Wall Street*, WALL ST. J., July 18, 1985, at 25, col. 2).

<sup>157</sup> See, e.g., *Stock Market May Surprise Investors* (Public Radio broadcast, Jan. 26, 1988) (transcribed in LEXIS, NEXIS library, OMNI file) ("Prior to the crash, stocks had been badly overpriced"); *Stocks for a Difficult Market*, FORTUNE, Dec. 21, 1987, at 176 ("The market was overvalued, and at the same time there was less and less liquidity in the economy to support it"); Ramirez, *Still Bullish at the Top*, FORTUNE, Nov. 23, 1987, at 90 ("The market will languish for a while, and I think it should, because it was way overpriced").

<sup>158</sup> See *Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 397 syl. para. 2, 513 N.E.2d 776, 776 syl. para. 2 (1987). For a discussion of the *Armstrong* holding, see text accompanying notes 117-40 *supra*.

<sup>159</sup> *Id.* at 397 syl. para. 2, 513 N.E.2d at 776 syl. para. 2.

of stock.<sup>160</sup> Other jurisdictions have also recognized the virtue of using the stock market price as a measure of value. In fact, one court has gone so far as to lambaste those jurisdictions that continue to utilize such nebulous terms as "fair cash value," "intrinsic value," "real value," and "fair value." It stated:

We do not know what those terms or others like them mean, and we suspect that the writers who advocate them do not know either. They use them because they distrust the market as a gauge of value. Yet realistically, under our economic system, the value of any item of property on any given date, in monetary terms, is what it can be sold for in a free and fair market.<sup>161</sup>

The stock exchange is, thus, a paradigm of the willing seller-willing buyer standard. As one court observed: "The market may not always appear to be in line with earnings, dividends, or asset value, but in the market all the factors which enter into a realistic determination of value are appraised by those who are most realistic, the actual buyers and sellers."<sup>162</sup>

To be sure, the modern investor's objective is not to promote the income of the corporation or to increase its assets.<sup>163</sup> Rather, his single-minded goal is to increase his distributive share of the corporation and enhance the value of his securities.<sup>164</sup> To the extent that the stock exchange measures the investor's success in accomplishing these objectives, it is the most useful criterion to determine value.<sup>165</sup> To the extent that the actual market price most accurately reflects value to an investor, its adoption as the measure of fair cash value satisfies the shareholder's investment expectations.<sup>166</sup>

Perhaps the practical aspects of adopting the actual market price as a value indicator provide an even more compelling argument than the theoretical grounds. Appraisal proceedings are expensive for the participants and extremely time consuming.<sup>167</sup> For an appraiser or a court to consider factors like net asset value, going concern value, liquidation value, net equity value, earnings value of the stock or dividends prospects, the nature of the enterprise and its relative position within the particular industry, and a myriad of other equitable concerns<sup>168</sup> may impose such a

<sup>160</sup> *Id.* at 411, 513 N.E.2d at 789.

<sup>161</sup> See Note, *Valuation of Dissenters' Stock*, *supra* note 28, at 1461 (quoting *Gallois v. West End Chem. Co.*, 185 Cal. App. 2d 765, 774, 8 Cal. Rptr. 596, 601-02 (Dist. Ct. App. 1960)).

<sup>162</sup> *Id.* at 1461 (quoting *Jones v. Healy*, 184 Misc. 923, 936, 55 N.Y.S.2d 349, 359-60 (Sup. Ct. 1945), *aff'd mem.*, 270 App. Div. 895, 62 N.Y.S.2d 605 (1946)).

<sup>163</sup> *Armstrong*, 32 Ohio St. 3d at 408, 513 N.E.2d at 787 (citing Note, *A Reconsideration*, *supra* note 28, at 1029).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 409, 513 N.E.2d at 787.

<sup>167</sup> *Id.* at 408-09, 513 N.E.2d at 787-88; see also Note, *A Reconsideration*, *supra* note 28, at 1030-31.

<sup>168</sup> *Armstrong*, 32 Ohio St. 3d at 404, 513 N.E.2d at 783-84.

cost on the dissenter that his recovery will fall below the full value of his shares.<sup>169</sup> Additionally, it may, in the extreme, completely offset his recovery.<sup>170</sup> In contrast, using the market price as the measure of value greatly narrows the scope of the appraisers' inquiry because if there is an active market present, the only factor bearing on a share's fair cash value is the actual market price. Thus, the appraisal proceeding is quicker and less expensive. Concomitantly, the corporation is less vulnerable to strike suits by dissenting shareholders because the threat of drawn-out, costly litigation is mitigated.<sup>171</sup>

Moreover, by utilizing the stock market price as the beginning point of analysis, the final outcome becomes more predictable and pre-appraisal settlement, therefore, becomes a more viable alternative.<sup>172</sup> Should litigation proceed, the narrower scope of analysis established by the willing seller-willing buyer criterion will reduce both discovery costs and attorney fees.<sup>173</sup> To summarize, whether adoption of the market price increases pre-appraisal settlements or reduces appraisal proceeding costs, all parties involved benefit. The dissenting shareholders receive an amount consistent with their investment expectations, absent exorbitant legal fees, and the majority shareholders' investment is not unduly damaged since less corporate funds will be expended to participate in the appraisal proceeding.<sup>174</sup>

Thus, the Ohio Supreme Court wisely adopted the market price as a measure of fair cash value. As stated earlier, the stock market is less than a perfect indicator of the value of a corporate concern. However, in an imperfect world, the stock market provides the most simple, inexpensive, and reliable means of determining a share's value with which the courts have to work.<sup>175</sup> Most other criteria are fraught with complexity and susceptible to subjective applications. In sum, the stock market is an efficient market that accurately and objectively reflects what the willing seller, under no compulsion to sell, is willing to accept and the willing buyer, under no compulsion to purchase, is willing to pay for a share of stock. In *Armstrong*, the Ohio Supreme Court laid down a standard that will accomplish what the appraisal statute sets out to do: "[A]llow the dissenter to exit the market in basically the same manner, and by the same terms, as he entered."<sup>176</sup>

## CONCLUSION

On October 30, 1981, the opening salvo in what became "the largest action for

<sup>169</sup> See Note, *A Reconsideration*, *supra* note 28, at 1060-63.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; see also *Armstrong*, 32 Ohio St. 3d at 408-10, 513 N.E.2d at 787-88.

<sup>172</sup> *Armstrong*, 32 Ohio St. 3d at 409-10, 513 N.E.2d at 787-88.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Note, *Valuation of Dissenters' Stock*, *supra* note 28, at 1463-64.

<sup>176</sup> *Armstrong*, 32 Ohio St. 3d at 412, 513 N.E.2d at 790.

relief to dissenting shareholders in the judicial history of Ohio'' was launched.<sup>177</sup> It took six long years for the smoke to clear, but by elucidating a theoretically and practicably cogent analysis of the Ohio appraisal statute, the Armstrong case has provided plentiful ammunition for the lower courts in Ohio to combat the inevitable onslaught of dissenting shareholders resulting from the proliferation of corporate takeovers.